Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

File No. 62-CV-17-989
(Hon. Robyn A. Millenacker)

CASE TYPE: OTHER CIVIL/MANDAMUS

United States Steel Corporation,

Plaintiff-Petitioner,

v.

John Linc Stine, in his official capacity as the Commissioner of the Minnesota Pollution Control Agency, and the Minnesota Pollution Control Agency,

Defendants-Respondents.

PLAINTIFF-PETITIONER'S MEMORANDUM IN OPPOSITION TO MPCA'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

U.S. Steel submits this memorandum in opposition to the motion for summary judgment brought by MPCA. MPCA's summary judgment memorandum is laden with assertions that contradict the plain language and clear intent of the applicable rules, statutes, and agreements governing in this matter. MPCA further recklessly and inaccurately uses the term "undisputed" to characterize matters that most certainly are in dispute. These factual issues render summary judgment inappropriate as to MPCA's counterclaims.

MPCA improperly asks this Court to summarily dismiss U.S. Steel's claims, when the record before the Court (including admissions by MPCA) confirms and establishes MPCA's failure to act on its clear legal duties and obligations as they relate to UAA Petition, SSS Request and the triennial review. Rather than act in a timely and orderly manner (per the relief sought in the mandamus action), MPCA posits excuses for its inaction that are not legally or factually supported. It further attempts to turn blame on U.S. Steel by claiming this action is merely a "delay" tactic—a wholly disingenuous accusation when MPCA has taken nearly three years to

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

act on the UAA Petition and, almost ten years after acknowledging that the Class 3 and Class 4 water quality standards should be modified (labeled a "priority" in 2008), MPCA has failed to do so. It clearly has no intention of proceeding in an orderly and timely manner as is evidenced by MPCA issuing a draft permit that fully applies and enforces the water quality standards that are the subject of U.S. Steel's request for relief. Mandamus relief is precisely for situations such as this when an agency refuses to act in a timely and reasonable manner as mandated by law.

MPCA's counterclaims for public nuisance and under the MERA are saturated with material facts in dispute. These claims allege violations of standards MPCA has acknowledged should be changed. MPCA's pollution allegations are vacuous and vague, but in any event are overbroad and disputed. Genuine issues of fact concerning the location and extent of any alleged pollution preclude summary judgment.

MPCA's claims under the 2011 Schedule of Compliance are precluded by the plain language of that agreement. U.S. Steel has fully complied with its obligations with respect to the dry controls and SCRS. Even if the agreement was ruled ambiguous and subject to interpretation by parol evidence, the competing parol evidence in the record requires factual determinations that cannot be made on summary judgment. MPCA's counterclaims are also subject to mandatory dispute resolution and must be dismissed for failure to follow the mandatory procedures under the agreement.

The relief requested in MPCA's counterclaims could be addressed in the pending permit proceeding, where MPCA controls the timing and substance of those proceedings and could address all issues therein. Accordingly, MPCA has an adequate alternative remedy and is not entitled to relief. Additionally, MPCA's request for this Court to order U.S. Steel to comply with

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

a "proposed" permit is patently premature and improperly seeks to sidestep the ordinary permitting process.

STATEMENT OF THE FACTS

U.S. Steel incorporates herein the Statement of Facts in its *Consolidated Memorandum in Support of Summary Judgment and Memorandum in Support of Motion to Dismiss or for Summary Judgment on Counterclaim*, filed on May 5, 2017. The following Statements of Facts is included herein for convenience of the Court and to demonstrate the plethora of factual issues precluding summary judgment on MPCA's counterclaims.

A. THE 2011 SCHEDULE OF COMPLIANCE.

On June 7, 2011, the parties entered into the 2011 Schedule of Compliance (the "Agreement"). Affidavit of Rob A. Stefonowicz dated May 5, 2017 ("Stefonowicz Aff. 5/5/17"), Ex. A p. 35., Part 7 of the Agreement contains the requirements U.S. Steel agreed to undertake. Part 7(a) reads:

> Within 60 days of the effective date of this Agreement, the Regulated Party will submit to MPCA a permit amendment application to permit the installation of the "Dry Controls Project" ***on Taconite Production Line 6*** at the Regulated Party's Minntac facility.

Id. Part 7(a) (emphasis added). If U.S. Steel sought to withdraw its application for dry controls and MPCA refused to permit withdrawal, U.S. Steel was granted the right to contest a denial through use of dispute resolution procedures. *Id.* Part 7(b). MPCA had to grant necessary permits before construction became necessary. *Id.* Part 7(c). After the dry controls were constructed on line 6, U.S. Steel would complete a performance evaluation of the dry controls project. *Id.* pp. 9-10 Part 7(e). U.S. Steel would collect at least *six months'* worth of data. *Id.* p. 10 Part 7(e). U.S. Steel would collect data on many parameters during this time, including: (1) control equipment performance for PM, PM_{10}, $PM_{2.5}$, SO_2, and Mercury (HG); (2) the nitrogen oxides/nitrogen

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

dioxides ratio for the stacks affected by the installation; (3) parametric monitoring records; (4) multi-pollutant co-control benefits; (5) cross media impacts; (6) energy efficiency or consumption impact; (7) technical and economic feasibility; and (8) impact on pellet quality. *Id.*

Other than submitting an application for permit amendment for dry controls on line 6, U.S. Steel did not commit to install dry controls on any other particular line at the Minntac facility.[1] *See generally* Stefonowicz Aff. 5/5/17 Ex. A Part 7. It is undisputed that U.S. Steel submitted an application to modify its air permit to install dry controls on line 6. *See* Declaration of Chrissy Bartovich dated May 24, 2017 ("Bartovich Decl.") ¶3. MPCA returned the application and requested additional information. *Id.* MPCA proposed that a revised dry controls application could wait until *after* issues with the dry controls were resolved. *Id.* Thereafter, U.S. Steel continued to work with MPCA to analyze issues relating to dry controls. *Id.* (addressed below).

B. U.S. STEEL IS FULLY COMPLIANT WITH A GROUNDWATER SULFATE REDUCTION PLAN AGREED TO BY THE PARTIES IN 2012.

In 2012, monitoring of groundwater at MW-12 showed exceedance of the 250 mg/L national secondary drinking water standard for sulfate. Bartovich Decl. ¶4. Those findings resulted in an amendment to the 2011 Schedule of Compliance (the "Agreement") (Amendment No. 1), which led to the development of an MPCA-approved Ground Water Sulfate Reduction Plan ("GWSRP") to achieve compliance. *Id.* U. S. Steel is in compliance with the GWSRP. *Id.*

---

[1] U.S. Steel has never understood the Agreement to require it to construct Dry Controls on four production lines at the Minntac facility, because of the uncertainty of the ability for the project to meet the requirements as listed. Bartovich Decl.") ¶2. In this regard, it must be observed that, even after dry controls were installed on line 6, an intense and wide-ranging review process would occur before any additional dry controls would be considered. Stefonowicz Aff. 5/5/17 Ex. A p. 9 Part 7(e). The Agreement's provision for such intense ongoing study and analysis of the dry controls corroborates that, at the time of the execution of the Agreement, MPCA and U.S. Steel were uncertain whether the dry controls would prove appropriate and effective.

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

Per the GWSRP, U. S. Steel is currently conducting pilot-scale groundwater treatment testing of a permeable reactive barrier (PRB) containing zero valent iron near the MW-12 monitoring well. *Id.* The pilot unit was installed during 2016 and will be monitored on a quarterly basis into 2018.

C. ONGOING STUDY AND ANALYSIS OF THE DRY CONTROLS REVEALS THAT THEY ARE INAPPROPRIATE.

Although U.S. Steel worked diligently to resolve issues related to dry controls between 2011 and 2014, significant obstacles relating to installation, including emission calculations, associated permit conditions, design criteria, and fluoride discussions, could not be resolved. *Id.* ¶5. Moreover, there were various material changes in circumstances between 2011 and 2014 that weighed against use of the dry controls, such as groundwater modeling results and MPCA's pre-public notice draft NPDES/SDS permit for Minntac issued in December 2014. *Id.* The Agreement had originally been executed because a reissued permit did not appear to be feasible in the near future. *Id.* However, the new permit ostensibly would contain a compliance schedule related to water quality standards that would take the place of the SOC requirements. Bartovich Decl. ¶5.

After U.S. Steel conducted extensive analysis of Dry Controls and other water related projects in accordance with the Agreement, it determined that Dry Controls could not achieve compliance with the 250 mg/L groundwater standard at the property boundary near MW12. *Id.* ¶6. However, U.S. Steel continued to investigate potential sulfate reduction technologies and discovered the PRB technology had the potential to achieve and exceed the groundwater sulfate compliance offered by Dry Controls. *Id.*

MPCA did not insist on strict compliance with installation of dry controls on line 6. *See* Declaration of Ann Foss dated May 1, 2017 ("Foss Decl."), ¶16. Instead, after MPCA was told that U.S. Steel would not be installing dry controls on line 6, MPCA indicated that alternate

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

proposals would be considered so long as they would achieve the same environmental benefits in the same time period. *Id.* U.S. Steel proposed that installation of PRB be used as an alternative to Dry Controls in November 2014. Bartovich Decl. ¶7. U.S. Steel communicated to MPCA that it believed alternative technologies such as PRB would allow groundwater regulations to be met on or before their respective deadlines. *Id.* ¶ 8.[2]

Prior to MPCA filing its Counterclaims, U.S. Steel understood that MPCA was willing to work with U.S. Steel to employ alternate technologies that were equally effective in lieu of dry controls. *Id.* ¶9. U.S. Steel developed this understanding based upon numerous communications from MPCA, both written and oral. *Id.* Because of MPCA's inducements, U.S. Steel invested significant resources and staff time in an effort to study alternatives such as PRB that would prove more effective than dry controls. *Id.*

D. GENUINE ISSUES OF MATERIAL FACT EXIST CONCERNING ANY ALLEGED POLLUTION.

It is factually inaccurate and a significant overstatement for MPCA to imply that all groundwater around the Tailings Basin has shown increases in sulfate and other dissolved elements. Bartovich Decl. ¶10. There is no objective evidence that would support such a broad assertion. *Id.* U.S. Steel has performed extensive work in the area of MW-12 to characterize subsurface geology and hydrology. Pilot-scale groundwater remediation testing utilizing permeable reactive barrier technology is on-going. *Id.* ¶ 11.

With respect to MPCA's claim that in areas near the Tailings Basin groundwater exceeds drinking water standards, it is important to recognize that the standards MPCA refers to are *non-binding* federal guidelines for fifteen constituents, referred to as the "secondary maximum contaminant levels" ("SMCL"), that are not enforced by the Environmental Protection Agency.

[2] The facility is in compliance with air regulations.

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

Id. ¶12. These non-binding standards were established as guidelines to assist public water systems in managing drinking water for aesthetic considerations (e.g., taste, odor, and color). *Id.* The fifteen contaminants do not present a risk to human health at the SMCL. *Id.*

With respect to MPCA's claim that groundwaters affected by the Tailings Basin are causing pollution of surface waters, this claim is utterly devoid of factual foundation. The location and magnitude of surface seepage from the Tailings Basin to surface waters (a process known as "daylighting"), is unknown and subject to intense debate. Bartovich Decl. ¶13. It would require significant technical and scientific studies to determine the extent and location of daylighting. *Id.*

In any event, any "pollution" that MPCA alleges is being caused by daylighting groundwater would not exceed appropriate WQS if MPCA had properly taken action on the Use Attainability Analysis Petition ("UAA Petition"), the Site-Specific Standard Request ("SSS Request"), or the triennial review (discussed below). *Id.* ¶14. If the receiving waters surrounding the Minntac Tailings Basin were reclassified to only include the uses which actually exist pursuant to the UAA Petition, the SSS Request, or the triennial review, seepage discharge from the Tailings Basin would be in compliance with applicable standards. *Id.*

MPCA's assertion that Timber Creek, Admiral Lake, and numerous other wetlands likely exceed applicable WQS is a breathtakingly broad claim without factual support. *Id.* ¶15. At any rate, the uses presently assigned to these waters are inappropriate because of low-flow conditions existing at these waters. *Id.*

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

E. THE USE ATTAINABILITY ANALYSIS PETITION, SITE-SPECIFIC STANDARD REQUEST, AND THE TRIENNIAL REVIEW.

On or about December 19, 2014, U. S. Steel submitted the UAA Petition to MPCA.[3] V. Compl. ¶36. The UAA Petition requested MPCA to remove the Class 3C (industrial consumption) and Class 4A (agricultural irrigation), and modify the Class 4B (livestock and wildlife) designated beneficial uses currently in place for the Upper Dark River and Timber Creek because such uses have not existed, do not exist, and are not reasonably expected to exist in the future. *Id.* at 36 and Ex. B (the UAA Petition). The commissioner of MPCA failed to reply in writing and indicate a plan for disposition of the UAA Petition or take any other action in response to the petition as required by law. V. Compl. at ¶41.

On or about October 30, 2015, U. S. Steel submitted the SSS Request to MPCA petitioning for modification of certain waterbodies downstream from the Tailings Basin. V. Compl. at ¶52 and Ex. C. The SSS Request prepared by U. S. Steel presented information supporting site-specific standards related to Class 3C (industrial consumption) and Class 4A (agricultural irrigation) beneficial uses for certain waters located in the Dark River and Sand River watersheds located northeast and northwest of the Minntac facility. V. Compl. at ¶53. MPCA has not acted on U.S. Steel's SSS Request.[4] V. Compl. ¶57.

---

[3] Information pertaining to the current and future uses of the waters at issue is discussed in further detail on pages 7-9 of U.S. Steel's memorandum in support of its summary judgment motion, filed on May 5, 2017.

[4] On December 2, 2015, Katrina Kessler, on behalf of MPCA, wrote to Tom Moe, Environmental Control Engineer with U.S. Steel, regarding the Site-Specific Request. *See* Stefonowicz Aff. Ex. B. Ms. Kessler commented that the Request "contains no data to demonstrate that 2B uses (specifically, support of aquatic life) are currently being met in the identified waters." Ms. Kessler then stated that ". . . acute and chronic toxicity tests of each water body identified in your request are needed on a quarterly basis for a period of time sufficient to demonstrate that the current pollutant loading from the Minntac tailings basin is not adversely impacting aquatic life." Ms. Kessler did not provide any further elaboration

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

U.S. Steel always expected that MPCA would act upon its UAA Petition and SSS Request after each respective request was submitted to MPCA. Bartovich Decl. ¶16.

MPCA is the state agency charged with enforcing the CWA, 33 U.S.C. §§ 1251–1387. *See* Minn. Stat. § 115.03; V. Compl. at ¶62. MPCA is, accordingly, responsible for conducting a triennial review of Minnesota's water quality standards and, as appropriate, modifying and adopting standards, as required by Section 303 of the CWA (codified as 33 USC §1313)). Nearly a decade ago, in 2008, MPCA began a triennial review of WQS and, based upon its review, concluded that Class 3 and Class 4 WQS should be modified.[5] V. Compl. ¶64. MPCA continued to consider these modifications through 2013, when MPCA conducted another triennial review (the last review conducted). During the 2013 review, MPCA indicated that "[r]evision to and update of existing Class 3 (Industrial Consumption) and Class 4 (Agriculture and Wildlife) designations and associated WQS" is a topic to be considered. *See* V. Compl. ¶67. MPCA further stated that the "[e]xamination of the Class 3 and Class 4 WQS has been proposed several times in the past, and was identified as a priority in the 2008 TSR, but the project has not proceeded due to other priority rule-related issues." *See id.* It would take approximately another three years before MPCA would announce its planned changes to the Class 3 and Class 4 standards. *See* V. Compl. at ¶72. In December 2015 the MPCA informed U.S. Steel that it planned to publish the revised rule for public comment and hold public meetings by September 2016 and complete the revision of the Class 3 and 4 standards by December 2016. Stefonowicz Aff. 5/24/17, Ex. A. MPCA has not completed those tasks.

---

concerning what period of time would be considered "sufficient" for MPCA. MPCA took no further action at any time with respect to the SSS Request.

[5] Additional information bearing upon MPCA's findings and recommendations related to the triennial review are discussed on pages 12-15 of U.S. Steel's memorandum in support of its summary judgment motion.

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

If MPCA acted on its own triennial water quality review recommendations, the UAA Petition, and/or the SSS request, the majority of the constituents and parameters subject to treatment and/or monitoring in the Draft NPDES/SDS Permit would not be required. V. Compl. at ¶50. Contrary to the assertion of MPCA, the terms of the draft NPDES/SDS permit for Minntac do directly implicate the UAA Petition, the Site-Specific Request, and the triennial review. Bartovich Decl. ¶18. For example:

- The UAA would remove all limits and monitoring requirements associated with the Class 3C and Class 4A standards at SD001, SW003, SW006, SW008 specified in Chapters 1, 2, and 11 of the draft permit. *Id.* ¶19.

- The SSS would remove interim period monitoring and final limits for Class 3C standards at SD001, SW003, SW005, SW006, SW007, SW008, SW001. The SSS would also revise the Class 4A water quality limits as well. Just as an example, the limits for specific conductance would be increased from 1,000 µmhos/cm to 2,000 µmhos/cm at SD001, SW003, SW005, SW006, SW007, SW008. *Id.* ¶20.

- If MPCA completed the triennial review, interim and final period monitoring for Class-3 related standards at SD001, SW003, SW005, SW006, SW007, SW008, SW001 would be removed. In addition, Class 4A water quality limits would be revised. Just as an example, the limits for specific conductance would be increased from 1,000 µmhos/cm to 1,700 µmhos/cm at SD001, SW003, SW005, SW006, SW007, SW008. *Id.* ¶21.

In order to specify the dates by which compliance with all final compliance limits would be met as required by the Agreement, U.S. Steel would need to expend significant resources and labor into investigating MPCA's assumptions and when, if at all, the permit limits could be met at the various locations. *Id.* ¶22. This would result in immediate harm to U.S. Steel. *Id.* MPCA's failure to act on the UAA Petition, SSS Request, and/or the triennial review will cause U. S. Steel irreparable harm, including, but not limited to, unrecoverable capital treatment expenditures of well over one-hundred million dollars, and annual operating costs that would

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

range in the tens of millions of dollars. V. Compl. ¶¶ 51, 61, 79. U. S. Steel would further be required to spend $1 to $2 million in developing treatment plans, performing investigative work and data collection. *Id.* If these extraordinary (and unrecoverable) expenses do not force U. S. Steel into a partial or total idling of the Minntac facility, they undoubtedly will place U. S. Steel at a distinct and significant competitive disadvantage in the market. *Id.*

F. VARIOUS GOVERNMENTAL AGENCIES NEED TO APPROVE PERMITS BEFORE U.S. STEEL COULD CONSTRUCT THE SCRS.

U.S. Steel has applied for, but not yet received, various permits necessary for construction of the Dark River Seep Collection and Return System (SCRS). Specifically:

- U.S. Steel needed to apply for a permit from the Army Corps of Engineers pursuant to 33 U.S.C. § 1344. U.S. Steel applied for the permit, but has not yet received a permit from the Army Corps. Bartovich Decl. ¶23(a).

- The Army Corps directed U.S. Steel to provide for indirect monitoring of the SCRS. An indirect monitoring plan was submitted to DNR, MPCA, and the Army Corps on November 30, 2016. To date, those agencies have not approved or denied the monitoring plan. *Id.* ¶23(b).

- After MPCA granted conditional approval of the plans and specifications for SCRS, U.S. Steel revised the design to minimize wetland impacts. On January 20, 2017, U.S. Steel submitted the revised plans and specifications to MPCA for review and approval as required. To date, MPCA has yet to approve the revised plans and specifications. *Id.* ¶23(c).

- DNR has informed U.S. Steel that it will need to submit a permit to mine amendment to address a boundary change at the Tailings Basin that would be caused by the SCRS. DNR indicated that it would provide an outline of information that would need to be contained within the application. However, DNR has failed to provide the information necessary to complete the application. *Id.* ¶24(d).

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

G. MPCA RESOLVES ANOTHER LAWSUIT BY AGREEING TO ISSUE A NEW PERMIT FOR MINNTAC BY SEPTEMBER 2017.

On November 9, 2016, the Minnesota Center for Environmental Advocacy and two other environmental organizations (collectively, "MCEA") filed a lawsuit against MPCA alleging that MPCA's permit for Minntac was inadequate. *See* V. Compl. Ex. A.[6] MPCA would issue the draft permit for Minntac *six days* after the MCEA Action was filed. *Id.* Then, on December 2, 2016, MPCA entered into a "Stipulation" with MCEA in which MCEA agreed to dismiss its lawsuit against MPCA in exchange for MPCA's agreement to, among other things, issue a final permit within nine months:

> The MPCA agrees that it shall pursue issuance of a final National Pollutant Discharge Elimination System/State Disposal System ("NPDES/SDS") permit governing surface water and groundwater pollution from the Minntac tailings basin with the goal of completing all administrative proceedings and issuing a final permit within nine months of the Effective Date of this stipulation.

Id. p. 2 ¶2.

H. THE DRAFT PERMIT FORECASTS MPCA'S INTENT TO REQUIRE COMPLIANCE WITH ALL POLLUTANT STANDARDS.

On November 15, 2016, MPCA issued a draft permit for the Minntac Tailings Basin. Stefonowicz Aff. 5/5/17 Ex. C. Notably, MPCA's sudden issuance of the draft permit after the settlement in the MCEA Action contradicted MPCA's prior public announcements that MPCA would delay reissuance of permits until 2018 to give MPCA time to put in place certain water quality standards. V. Compl. ¶ 12.

The draft permit purports to regulate all pollutants into the waters of the state, as follows:

---

[6] The action was titled *State of Minnesota ex rel., Minnesota Center for Environmental Advocacy, Save Lake Superior Association and Save Our Blue Sky Waters v. Minnesota Pollution Control Agency*, Court File No. 62-CV-16-6257 (the "MCEA Action").

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

> 1.1 For the tailings basin discharge . . . to groundwater, the Permittee shall meet the terms of the SDS compliance schedule detailed below to mitigate impacts to waters of the state (surface and groundwater), and to attain compliance with permit limits described as follows:
> * * *
> b. final compliance limits in surface waters impacted by deep seepage that are based on the water quality pollutant standards for applicable uses of the water body. This schedule requires compliance with final limits for these locations to be attained in the shortest reasonable period of time; and,
> * * *
> * * *
>
> 1.3 . . . ***In addition to requiring reductions in sulfate within the tailings basin***, the SDS compliance schedule ***requires that permittee to specify by month 37 . . . the dates by which final compliance will be met for all pollutants and how those limits will be met***[.]

Stefonowicz Aff. 5/5/17, Ex. C p. 22 (emphasis added).

I. MPCA REFUSES U.S. STEEL'S DEMAND THAT ACTION BE TAKEN ON THE UAA PETITION, SSS REQUEST, AND THE TRIENNIAL REVIEW.

Prior to U.S. Steel serving and filing its Verified Complaint and Petition for Writ of Mandamus in this action, representatives of U.S. Steel met with Mr. John Linc Stine, the Commissioner of the MPCA, to demand that action be taken on the UAA Petition, the SSS Request, and the triennial review. Declaration of Lawrence Sutherland dated May 24, 2017 ("Sutherland Decl.") ¶2. U.S. Steel expressed its desire to reach an agreement with MPCA whereby the outstanding UAA Petition, SSS Request, and triennial review would be addressed and resolved. *Id.* ¶ 3. Subsequently, Mr. Stine instructed U.S. Steel that MPCA did not wish to enter into an agreement with U.S. Steel and U.S. Steel should proceed with its mandamus action if it was so inclined. *Id.* ¶ 4. Having been rebuffed by MPCA, U.S. Steel proceeded with the instant mandamus action. *Id.* ¶ 5.

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

ARGUMENT

I. THE COURT SHOULD ORDER MPCA TO TAKE ACTION ON THE USE ATTAINABILITY ANALYSIS PETITION, SITE SPECIFIC STANDARD REQUEST, AND THE TRIENNIAL REVIEW.

MPCA asserts that it has no clear legal duty to take action with respect to the UAA, SSS, or triennial review. MPCA Memo. p. 29. Although MPCA's arguments with respect to these three regulatory issues vary slightly, a common refrain is that mandamus is inappropriate because the applicable statutes and rules do not impose specific time limitations requiring MPCA to take action. *See* MPCA Memo. pp. 30, 32, 35. In addition, MPCA posits that mandamus is unavailable based upon equitable defenses. *See* MPCA Memo. pp. 31, 34. MPCA's assertions are without legal foundation and must be set aside. The statutes and rules governing the UAA, SSS, and triennial review impose clear and mandatory duties; therefore, mandamus should issue.

A. MPCA Was Obliged to Act Upon the UAA, SSS, and Triennial Review.

MPCA implicitly asserts that, unless a statute expressly requires MPCA to take action within a specific period of time, MPCA has an infinite period of time to act. For example, MPCA acknowledges that once the commissioner finds that evidence submitted in support of a UAA supports a review of designated uses, he has the "dut[y]" to commence a use attainability analysis. *See* MPCA Memo. p. 30. Contrary to the plain language of Minn. R. 7050.0405, subp. 2, MPCA evidently believes the commissioner has an unlimited amount of time to consider the evidence supporting a UAA. *See id.* Similarly, MPCA acknowledges that it is "require[d]" to evaluate and review data supporting an SSS, yet it asserts it has absolute discretion to decide when to act upon an SSS. MPCA Memo. p. 33. MPCA's assertions are contrary to well-established principles of interpretation, contrary to common sense, and must be rejected.

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

1. *The UAA Petition.*

MPCA acknowledges that it received U.S. Steel's 2014 UAA Petition but that it has failed to indicate a plan for disposition of the petition or commence a UAA analysis. *See* MPCA Memo. p. 30. MPCA further acknowledges that it has been nearly three years since U.S. Steel originally filed its UAA petition. *See id.* p. 29. MPCA concedes that, under Minn. R. 7050.0405, subp. 2, the obligation to commence a UAA analysis is a "dut[y]." *Id.* Nevertheless, MPCA contends that this duty is contingent upon its review of the evidence offered by a UAA applicant. *Id.* The unspoken contention in MPCA's memorandum is that MPCA may take an unlimited amount of time to consider the evidence. MPCA's interpretation of Minn. R. 7050.0405, subp. 2 disregards the rule's plain language. Minn. R. 7050.0405, subp. 2 states:

> Upon receiving a petition, *the commissioner has 60 days to reply in writing* and indicate a plan for disposition of the petition. . . . If the commissioner finds that the evidence submitted supports a review of the designated uses, *a use attainability analysis must be commenced within six months of the commissioner's reply* to the complete petition.

Application of foundational principles of statutory interpretation counsel that the commissioner had a duty to indicate a plan for disposition of U.S. Steel's UAA Petition within sixty days of receipt of the Petition. Minn. R. 7050.0405, subp. 2 is unambiguous that the commissioner was required to take action on the UAA Petition within six months of the commissioner's reply. MPCA's "interpretation" of the rule—which grants MPCA an indefinite period in which to consider evidence in support of a UAA Petition—violates the patent intent behind the rule to create a prompt review process for use classifications. *State ex rel. Laurisch v. Pohl*, 214 Minn. 221, 223 (Minn. 1943).

Even if the plain language of Minn. R. 7050.0405, subp. 2 did not specify the deadline by which MPCA was required to act on the UAA Petition, MPCA would still be incorrect that it has

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

an unlimited amount of time to consider the evidence in support of the Petition. There is a "well-recognized common-law rule that, where an officer or person is required to act, he must do so within a reasonable time." *Suhr v. Dodge County*, 183 Minn. 299, 302 (1931); *see also Laurisch*, 214 Minn. at 227 (recognizing that public officers must perform their mandatory duties within a reasonable time, and that failure to do so renders the omitted acts properly subject to mandamus). The Minnesota Supreme Court has determined that: "[w]hen a statute requires a governmental body to perform some act, it is reasonable to assume the governmental body will do so or it could be compelled to do so by mandamus." *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536, 542 (Minn. 2007) (citations omitted).

An argument similar to MPCA's assertion in the case at bar was made in *Laurisch v. Pohl*. In that case, the supreme court affirmed the district court's ruling that the Blue Earth County Board of Commissioners had a mandatory duty to redistrict the county. 214 Minn. at 226-227. The commissioners claimed that the district court erred when it directed them to "'proceed forthwith'" on the redistricting. *Id.* at 227. The commissioners further averred that they had discretion to take up the redistricting at such time as they deemed proper. *Id.* The district court and supreme court disagreed, recognizing that the commissioners had failed to act in violation of their clear duty for nearly three years. *Id.* The supreme court concluded that ". . . the commissioners have not only failed to comply with the statute, but do not inten[d] to do so unless compelled by mandate." *Id.* Accordingly, the supreme court affirmed the trial court's mandamus order directing the board of commissioners to take up redistricting "forthwith."

Just as in *Laurisch*, it has been nearly three years since U.S. Steel first filed the UAA Petition. There is no indication that MPCA intends to take any action on the UAA Petition absent a directive of this Court forcing it to do so. In point of fact, when U.S. Steel sought MPCA's

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

commitment to undertake the UAA analysis, MPCA declined and encouraged U.S. Steel to bring this mandamus case. Consequently, U.S. Steel respectfully requests that the Court order MPCA to immediately indicate a plan for disposition of U.S. Steel's UAA Petition and take all further actions required by Minn. R. 7050.0405, subp. 2.

2. *The SSS Request.*

MPCA contends that Minn. R. 7050.0220, subp. 2 "does not place a duty on the MPCA to act on an SSS at any particular time[.]" MPCA Memo. p. 32. However, the statute is unmistakably mandatory in effect. Minn. R. 7050.0220, subp. 2 reads:

> The standards in this part and in parts 7050.0221 to 7050.0227 *are subject to review and modification* as applied to a specific surface water body, reach, or segment. *If* site-specific information is available that shows that a site-specific modification is more appropriate than the statewide or ecoregion standard for a particular water body, reach, or segment, the site-specific information *shall be applied.*

(Emphasis added.) Moreover, Minn. Rule 7050.0220, subp. 7. B., states that site-specific information may be provided to MPCA "by any person outside the agency", that the "commissioner *shall evaluate* all relevant data in support of a modified standard" and that the commissioner is to "determine whether a change in the standard for a specific water body … is justified." (Emphasis added).

The use of the word "shall" in Minn. R. 7050.0220, subp. 2 obliges the application of site-specific criteria where appropriate. *See Laurisch*, 214 Minn. at 227; *cf. Champ*, 197 Minn. at 57. Similarly, Minnesota Rule 7050.0220, subp. 7. B.'s command that the commissioner "shall evaluate all relevant data" imposes a mandatory duty. Any construction of the aforementioned rule that would permit MPCA to indefinitely ignore site-specific requests would hinder the palpable intent to create a formalized process for the review of site-specific requests. *See Laurisch*, 214 Minn. at 223. Consequently, MPCA was required to take final agency action on

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

the SSS Request within a reasonable time. *See Suhr*, 183 Minn. at 302; *see also Laurisch*, 214 Minn. at 227. MPCA has not taken final action on the SSS Request since it was submitted in October 2015. The Court should therefore grant mandamus and order MPCA to take action on the SSS Request.

3. *The Triennial Review.*

MPCA claims that "[n]othing in 33 U.S.C. § 1313(c)(1) or other law requires the MPCA to complete rulemaking to revise a water quality standard in a particular time period." MPCA Memo. p. 35. MPCA's argument flouts the express language of the statute. It is undisputed that MPCA has determined that modification of the Class 3 and Class 4 WQS is necessary and appropriate. Indeed, it has been nearly a decade since MPCA first concluded the Class 3 and Class 4 WQS should be modified. V. Compl. ¶64. Since that time, MPCA has repeatedly reaffirmed that modifications are appropriate. *Id.* ¶¶64-72. These findings make modification of the existing standards and adoption of the new standards *mandatory*: the statute is unequivocal that the water pollution control agencies subject to its reach "shall" take the actions required by the statute. 33 U.S.C. § 1313(c)(1); *see Laurisch*, 214 at 223.

MPCA also claims that mandamus is not available because of pending rulemaking proceedings to amend the Class 3 and 4 WQS that it "recently" initiated in February 2016. MPCA Memo. p. 36. Yet, U.S. Steel's request for mandamus relief is broader than just seeking an order compelling MPCA to *commence* rulemaking proceedings. U.S. Steel prays for mandamus compelling the *adoption* of new WQS—which is no more than MPCA has already

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

determined is appropriate.[7] Consequently, the Court may properly grant U.S. Steel mandamus with respect to the triennial review.

B. MPCA's Equitable Arguments Are Without Merit.

MPCA presents a variety of far-fetched equitable defenses in an attempt to avoid mandamus. For example, MPCA contends that mandamus is inappropriate because U.S. Steel failed to vigorously demand that MPCA take action upon the UAA Petition. MPCA Memo. p. 31. MPCA concludes that latches therefore bars mandamus relief. *Id.* pp. 31-32. For the reasons discussed below, MPCA's equitable defenses are without foundation in the record and are unsupported by case law.

1. *MPCA's Assertion that Mandamus Relative to the UAA Petition is Barred by Laches is Wholly Unsupported.*

With respect to the UAA Petition, MPCA contends that U.S. Steel is barred from maintaining a mandamus action by operation of laches because U.S. Steel did not remind MPCA of its duty to act on the Petition. *Id.* at 31.[8] MPCA cites to evidence alleged to demonstrate U.S. Steel's lack of diligence concerning the UAA Petition; for example, MPCA refers to U.S. Steel not affirmatively raising the UAA Petition during meetings between MPCA and U.S. Steel. *Id.* Remarkably, MPCA then asserts that it was *U.S. Steel's* "lack of attention" that is the cause for MPCA's non-action on the UAA Petition. *See id.*

MPCA cannot cite one case, and U.S. Steel is aware of none, that allows a governmental agency that has failed to comply with a mandatory rule or statute compelling the agency to take

---

[7] In December 2015 the MPCA informed U.S. Steel that the MPCA planned to complete that rulemaking by December 2016. Stefonowicz Aff., 5/24/17, Ex. B. Had MPCA actually complied with that schedule the revised standard would be in effect.

[8] Laches is the only specific equitable defense mentioned by MPCA with respect to the UAA Petition. MPCA Memo. p. 31.

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

action to skirt responsibility by claiming that another party had to remind it of its obligatory duty. Where an application has been submitted and the law requires that the government take action on that application, *the law itself* is a standing demand that the government take action. *Cf. State v. Weld*, 39 Minn. 426, 428 (1888) (citations omitted) ("The statue was a standing demand, and the omission of the respondents to obey was a refusal.") (citations omitted). At all times since U.S. Steel filed its UAA Petition in 2014, U.S. Steel has justifiably expected that MPCA would comply with its responsibilities under Minn. R. 7050.0405, subp. 2. Bartovich Decl. ¶16.[9] In addition, U.S. Steel made demand on MPCA to act on the UAA Petition (as well as the SSS Request and the triennial review) prior to instituting this suit—MPCA rebuffed that demand. Sutherland Decl. ¶4.

Furthermore, MPCA has not shown that it has suffered cognizable prejudice caused by U.S. Steel's alleged lack of attention, as it must to prove laches. The party asserting laches caused by delay in bringing a mandamus petition must demonstrate "substantial prejudice" resulting from delay. *Johnson v. Minnesota Farm Bureau Marketing Corp.*, 304 Minn. 292, 295 (1975). For laches to bar a claim based upon delay, the delay must be ". . . so long and the circumstances of such character as to establish a relinquishment or abandonment of the right." *State ex rel. Peterson v. Bentley*, 216 Minn. 146, 160 (1943), *overruled on other grounds by State by Peterson v. Anderson*, 220 Minn. 139 (1945). "'Mere delay does not constitute latches[.]" *Elsen v. State Farmers Mut. Ins. Co.*, 219 Minn. 315, 321 (1945) (quoting *Lloyd v. Simons*, 97 Minn. 315, 317 (1906)).

---

[9] Similarly, since U.S. Steel filed its SSS Request in October 30, 2015, U.S. Steel has justifiably expected that MPCA would comply with its responsibilities under Minn. R. 7050.0220. *See* Bartovich Decl. ¶16.

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

The only supposed prejudice MPCA identifies in support of its laches defense is the conclusory, unsubstantiated, and self-serving claim that: "[h]ad U.S. Steel requested action, the UAA *might* have been resolved prior to the present attempt to stop the MPCA from issuing the permit." MPCA Memo. p. 32 (emphasis added). MPCA's naked speculation that the UAA "might" have been resolved is far too speculative to meet the required evidentiary showing of prejudice. *See State ex rel. Peterson v. Bentley*, 216 Minn. 146, 160 (1943) (ruling that the main question to answer when laches is asserted is whether the defendant "*will* be prejudiced[.]") (emphasis added), *overruled on other grounds by State by Peterson v. Anderson*, 220 Minn. 139 (1945). At any rate, MPCA is not cognizably prejudiced by an action seeking to compel MPCA to carry out a ministerial duty that it has had at all times since the UAA Petition was submitted in late 2015. Minn. R. 7050.0405, subp. 2. Furthermore, MPCA, standing in open violation of its legal responsibilities, is in no position to raise the equitable defense of laches. *Sanborn v. Sanborn*, 503 N.W.2d 499, 504 (Minn. Ct. App. 1993) (observing that "[a] party whose hands are themselves unclean may not assert the equitable defense of latches.").

2. *MPCA's Assertion that Mandamus Relative to the SSS Request is Barred by Unclean Hands is Baseless.*

MPCA claims that U.S. Steel is solely at fault for delay in action being taken on the SSS Request, relying exclusively upon a December 2015 e-mail where MPCA wrote that the SSS request ". . . contains no data to demonstrate that 2B uses (specifically, support of aquatic life) are currently being met in the identified waters." Stefonowicz Aff. 5/5/17, Ex. B. MPCA indicated that ". . . acute and chronic toxicity tests of each water body identified in your request are needed on a quarterly basis *for a period of time sufficient to demonstrate that the current pollutant loading from the Minntac tailings basin is not adversely impacting aquatic life*." *Id.* (emphasis added). No elaboration was provided concerning how long U.S. Steel was expected to

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

provide toxicity tests or what MPCA would consider "sufficient to demonstrate that the current pollutant loading from the Minntac tailings basin is not adversely impacting aquatic life." *Id.* MPCA's vague testing request did not satisfy MPCA's obligation to take final agency action on the SSS Request. Accordingly, the Court should grant mandamus and order the commissioner to act on the Request.

II. ABSENT MANDAMUS RELIEF, U.S. STEEL WILL SUFFER GREAT AND IRREPARABLE INJURY.

The efficacy of mandamus relief would be negligible if MPCA is permitted to proceed with issuing a new permit before taking action on the UAA, SSS, and triennial review. Bartovich Decl. ¶17. Contrary to the naked assertion of MPCA, the terms of the draft NPDES/SDS permit for Minntac do directly implicate the UAA Petition, the Site-Specific Request, and the triennial review. *Id.* ¶18. The UAA Petition, SSS Request, and triennial review would remove interim and final requirements for Class 3C and Class 4A standards and would also remove monitoring requirements. *Id.* ¶¶19-21. To specify dates by which final compliance limits could be met in accord with the draft permit (*see* Stefonowicz Aff. 5/5/17, Ex. C p. 22), U.S. Steel would need to expend significant resources and labor to investigate assumptions and when, if at all, the permit limits could be met at the various locations. *Id.* ¶22. This would result in immediate harm to U.S. Steel. *Id.*

U.S. Steel's request for mandamus relief asks for no more than MPCA previously acknowledged was appropriate: standards should be revised before new permits are issued. *See* V. Compl. ¶27. By MPCA's own admission, it is proceeding out of sequence by rushing to issue a new permit before standards are revised. The motivation for MPCA's profound shift in approach (i.e., to issue a new permit *before* standards are revised) is easy to discern—MPCA was sued. *See* V. Compl. Ex. A. To get the case dismissed, MPCA committed to rush out a new

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

permit irrespective of whether the standards and other conditions in the permit were legitimate or supported. *See id.* Hence, after nearly twenty-five years of not acting on a new permit, MPCA insists on immediately issuing a new permit—even though the standards governing that permit are conceded to be erroneous and lacking (V. Compl. ¶¶64-67)—to cocoon itself from further litigation.[10] MPCA's desire to shield itself from the consequences of an inadvisable settlement is not a basis to deny U.S. Steel's mandamus request.

MPCA's failure to act on the UAA Petition, SSS Request, and/or the triennial review will cause U. S. Steel irreparable harm, including, but not limited to, unrecoverable capital treatment expenditures of well over one hundred million dollars, and annual operating costs that would range in the tens of millions of dollars. V. Compl. ¶¶ 51, 61, 79. U. S. Steel would also be required to spend $1 to $2 million in developing treatment plans, performing investigative work and data collection. *Id.* If these extraordinary (and unrecoverable) expenses do not force U. S. Steel into a partial or total idling of the Minntac facility, they undoubtedly will place U. S. Steel at a distinct and significant competitive disadvantage in the market. *Id.* Consequently, mandamus relief is necessary to prevent great and irreparable injury. *See DiMa Corp. v. City of Albert Lea*, No. A12-1284, 2013 WL 1500873, at *6 (Minn. Ct. App. April 15, 2013) (concluding that financial harm is irreparable where a party will suffer unrecoverable monetary damage); *cf. Hettler v. Petters*, No. 02-1837, 2005 WL 715933, at *2 (D. Minn. March 29, 2005).

III. U.S. STEEL HAS NO OTHER ADEQUATE, SPECIFIC LEGAL REMEDY.

MPCA contends that mandamus is unavailable because U.S. Steel has an adequate remedy at law. MPCA Memo. p. 38. MPCA claims that the following are alternative remedies: (1) pending MPCA administrative proceedings concerning the draft permit; (2) the possibility

[10] If MPCA does not issue a final permit by September 2017, MCEA may refile the dismissed MCEA Action.

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

that U.S. Steel's variance requests in the administrative proceedings may be granted, which "could alleviate any injury U.S. Steel claims it will suffer, at least temporarily"; and (3) U.S. Steel's right to pursue certiorari proceedings in the future if MPCA's permit is not satisfactory. *Id.* None of these supposed alternatives provide the type of adequate remedy such that this Court is deprived of jurisdiction to grant mandamus.

MPCA incorrectly suggests that MPCA can grant relief equivalent to that requested in the UAA, SSS and rule update in the process of issuing an NPDES/SDS permit or a variance related to the relevant standards. MPCA's statements to the Court on that issue contradicts applicable law. In fact MPCA's suggestion is contrary to this direct MPCA statement in its acknowledgement of the U.S. Steel SSS request submittal: "Further, please be aware that requests for Use Attainability Analyses, Site Specific Standards, and Agency-led rulemaking do not limit the applicability of current standards and any permit issued during this timeframe must rely on existing water quality standards in setting limits." Stefonowicz Aff. 5/5/17 Ex. B.

"'[T]he remedy which will preclude mandamus must be ***equally as convenient, complete, beneficial, and effective*** as would be mandamus, ***and be sufficiently speedy to prevent material injury***.'" *Kramer v. Otter Tail County Bd. of Com'rs*, 647 N.W.2d 23, 26-27 (Minn. Ct. App. 2002) (emphasis added) (quoting 52 Am. Jur. 2d Mandamus § 49 at 374 (1970)). Here, mandamus is the only remedy that provides immediate and effectual relief to U.S. Steel.

A. <u>Additional Administrative Proceedings Are Not an Adequate Remedy</u>.

MPCA argues that U.S. Steel "does not need to bring its mandamus claims to this Court, because it has the right to contest the terms of the draft permit in the administrative proceeding." MPCA Memo. p. 38. This is not an adequate remedy because MPCA has previously expressed that the WQS in the final permit will be based upon the standards in the draft permit. *See* Stefonowicz Aff. 5/24/17, Ex. A ("please be aware that requests for Use Attainability Analyses

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

[sic], Site Specific Standards, and Agency-led rulemaking do not limit the applicability of current standards ***and any permit issued during this timeframe must rely on existing water quality standards in setting limits***."). Thus, MPCA's contention about an adequate remedy being available in the pending administrative proceeding is insincere at best. In addition, that there is a *possibility* MPCA may eventually take into account the standards that are at the center of U.S. Steel's mandamus requests in the pending permitting proceedings does not prove that alternative is as beneficial and effective as an immediate mandamus order requiring MPCA to take action upon these standards.

MPCA's assertion that U.S. Steel may secure relief in pending administrative proceedings before the agency is akin to an argument that was made and rejected in *City of Waite Park v. Minnesota Office of Administrative Hearings*, No. A05-1888, 2006 WL 1985457 (Minn. Ct. App. July 18, 2006). In that case, Waite Park petitioned for a writ of mandamus seeking to compel the Office of Administrative Hearings ("OAH") to permit annexation of certain land. The district court granted the city's mandamus petition, finding that mandamus was the city's only adequate legal remedy. *Id.* at *2. OAH appealed this findings and the court of appeals affirmed. *Id.* at *7. The appellate court approved of the district court's rejection of OAH's contention that an adequate legal remedy existed because the city could go through a hearing process as directed by OAH. *Id.* The court of appeals held that further administrative proceedings were not an adequate alternate remedy because that process would require "formal hearings, informal discussions, and alternative dispute resolution [that] would prolong the process, raising litigation costs, time consumed, and require additional procedures the City would not have otherwise incurred." *Id.*

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

Here, the consequences U.S. Steel will suffer absent mandamus relief are far more compelling than were found sufficient to merit mandamus in *City of Waite Park*. Absent mandamus relief, MPCA will suffer grievous and irreparable injury before the administrative proceedings on the permit are complete, such as (a) unrecoverable capital treatment expenditures of well over one-hundred million dollars, (b) annual operating costs that would range in the tens of millions of dollars, and (c) $1 to $2 million in developing treatment plans, performing investigative work and data collection. V. Compl. at ¶51. These expenses will place U.S. Steel at a competitive disadvantage, and could even cause partial or total idling of the Minntac facility. *Id.* Thus, the ongoing administrative proceedings concerning the draft permit are not an adequate alternative remedy.

B. The *Possibility* MPCA May Grant a Variance is Not an Adequate Remedy.

MPCA implies that U.S. Steel's request for variances in the administrative proceeding is an adequate remedy. MPCA Memo. p. 38. MPCA's memorandum itself demonstrates why a variance is not an adequate alternative remedy to mandamus. As MPCA observes, "a 'variance' is 'a *temporary* change in a state water quality standard[.]'" MPCA Memo. p. 21 (emphasis in original). The temporary relief provided by a variance is easily distinguished with the permanent relief sought by U.S. Steel herein. Thus, a variance is not "equally" as "beneficial" and "effective" as mandamus. *See* Kramer, 647 N.W.2d at 26-27. In addition, a variance is contingent upon approval from the Environmental Protection Agency. MPCA Memo. p. 21 ("For a variance from an adopted water quality standard, EPA approval is required.") (citing Minn. R. 7050.0190, subp. 1.). A contingent remedy is not an adequate remedy at law. *Alevizos v. Metro. Airports. Comm'n of Minneapolis and St. Paul*, 298 Minn. 471, 495 (1974) (holding that a contingent remedy premised upon the State Claims Commission was not an adequate remedy precluding mandamus). Thus, a variance is not an adequate remedy.

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

C. A Subsequent Certiorari Action is Not an Adequate Remedy.

That U.S. Steel could conceivably maintain a certiorari action in the future once MPCA issues a permit is not an adequate remedy precluding mandamus, for at least three reasons. First, U.S. Steel would still sustain the extraordinary financial harm discussed in Section E of the above Statement of the Facts. *See McLean Distrib. Co. v. Brewery and Bev. Drivers, Warehousemen and Helpers Union Local No. 993*, 254 Minn. 204, 211 (1959) (concluding that there was no adequate alternative to mandamus where delay would cause substantial financial harm). Second, certiorari review of the draft permit would consume additional time and energy and be more complicated than if the Court were to simply issue an order for mandamus. *Int'l Union of Operating Engineers, Local No. 49 v. City of Minneapolis*, No. 700891, 1974 WL 21549, at *6 (Minn. D. Ct. 1974) (ruling that the potential for a later certiorari action does not cut off the right to mandamus relief where certiorari would be more time consuming than mandamus proceeding); *see Kramer*, 647 N.W.2d at 26 (holding that certiorari was not an adequate alternative remedy because "a complete record must be provided" and therefore certiorari was "more expensive, more time-consuming, and more complicated than a petition to the district court for a writ of mandamus."). Finally, a subsequent proceeding by certiorari would not be adequate because the court of appeals would not have authority in a certiorari proceeding to compel MPCA to take the actions requested by U.S. Steel.

As stated in *State ex rel. Spurck v. Civil Service Bd.*:

> While the court cannot in a certiorari proceeding direct the administrative agency upon reversal of its determination as to the precise course it shall pursue, even though the court's decision is binding upon the agency, it can by writ of mandamus compel performance of a judicially determined mandatory duty[.]

226 Minn. 240, 252 (Minn. 1948) (internal citation omitted); *see also Minneapolis-Honeywell Regulator Co. v. Nadasdy*, 247 Minn. 159, 168 n. 4 (1956) (remarking that it was "doubtful"

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

whether certiorari would be an adequate and speedy remedy where plaintiff sought to compel the issuance of a building permit by certiorari). Accordingly, a certiorari action is not an adequate alternative remedy.

IV. THE COURT SHOULD GRANT PERMANENT INJUNCTIVE RELIEF ORDERING MPCA TO PERFORM ITS LEGAL DUTIES AND ENJOINING THE REISSUANCE OF THE NPDES PERMIT.

MPCA claims that the Court is without authority to enjoin MPCA from reissuing an NPDES/SDS permit that includes limitations and requirements based on water quality standards that are the subject of the UAA Petition, SSS Request, and triennial review. MPCA Memo. pp. 38-40. MPCA posits that such an injunction would be an "unnecessar[y] interfere[nce] with" the permitting process. MPCA Memo. p. 39. However, district courts have broad discretion when it comes to equitable relief such as mandamus. *See State ex. rel. Swan Lake Area Wildlife Ass'n*, 799 N.W.2d 619, 625 (Minn. Ct. App. 2011) ("A district court has broad discretion when fashioning an equitable remedy."); *Alerus Financial Nat. Ass'n v. Martin Holdings, LLC*, No. A13-0407, 2013 WL 6390337, at *8 (Minn. Ct. App. 2013) (same); *cf. Johnson v. Minnesota Farm Bureau Marketing Corp.*, 304 Minn. 292, 295 (1975). "A court may fashion equitable remedies based on the exigencies and facts of each case so as to accomplish justice." *Pooley v. Mankato Iron & Metal, Inc.*, 513 N.W.2d 834, 837-838 (Minn. Ct. App. 1994) (citing *Clark v. Clark*, 288 N.W.2d 1, 11 (Minn. 1979)). In the case at bar, the severe irreparable injury to be suffered by U.S. Steel should MPCA issue a permit prior to taking action on the UAA Petition, SSS Request, and triennial review instruct that the Court should grant permanent injunctive relief enjoining reissuance of the permit until action has been taken on these matters.

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

V. GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT CONCERNING U.S. STEEL'S ALLEGED POLLLUTION.

Without referring to any particular location or violation, MPCA makes the overbroad claim that "U.S. Steel cannot dispute that its Tailings Basin has caused the quality of the waters of the state to exceed applicable standards." MPCA Memo. p. 41. However, it is factually inaccurate and a significant overstatement for MPCA to imply that all groundwater around the Tailings Basin has shown increases in sulfate and other dissolved elements. Bartovich Decl. ¶10. There is no objective evidence that would support such a broad assertion and U.S. Steel denies it. *Id.* Genuine material fact issues relating to MPCA's counterclaims compel the conclusion that MPCA's motion for summary judgment on the counterclaims must be denied.

A. U.S. Steel Disputes That the Tailings Basin Causes Nuisance Conditions.

MPCA asserts that U.S. Steel "admitted" pollution based upon 2012 water monitoring data. *See* MPCA Memo. p. 41. This is erroneous and misleading. Based upon the 2012 groundwater data, the parties agreed to execute the GWSRP to achieve compliance. U. S. Steel is in compliance with the GWSRP. Bartovich Decl. ¶4. Indeed, per the GWSRP, U. S. Steel is currently conducting pilot-scale groundwater treatment testing of a permeable reactive barrier (PRB) containing zero valent iron near the MW-12 monitoring well. *Id.* The pilot unit was installed during 2016 and will be monitored on quarterly basis into 2018. *Id.* U.S. Steel denies that this data is an admission and denies any of the other alleged "admissions" asserted by MPCA.

B. U.S. Steel Disputes That the Tailings Basin is Causing "Pollution, Impairment or Destruction" of Natural Resources.

Without identifying any particular location at the Tailings Basin, standard or particularized evidence, MPCA claims there is no genuine issue of material fact concerning "impact that pollutants from the Minntac Tailings Basin have had on the groundwater and

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

surface waters in the vicinity of the Tailings Basin." MPCA Memo. p. 42. However, U.S. Steel does dispute the nature and extent of any alleged pollution in the vicinity of the Tailings Basin and does dispute the need for any remedy to combat alleged pollution. Furthermore, U.S. Steel believes that MPCA's implicit assertions with respect to the ability to ascertain the extent of any daylighting are based wholly on speculation and are without any evidentiary support. *See* Bartovich Decl. ¶13. It would require significant technical and scientific studies to ascertain the extent and location of daylighting.

U.S. Steel also disputes that the unidentified "applicable standards" (MPCA Memo. p. 42) relied upon by MPCA are binding law or regulation. The SMCL guidelines are *non-binding standards* that were established as *guidelines* to assist public water systems in managing drinking water for *aesthetic* considerations (e.g., taste, odor, and color). Bartovich Decl. ¶12. The fifteen contaminants do not present a risk to human health at the SMCL. *Id.*

U.S. Steel disputes that any alleged pollution has caused harmful or injurious effects such that this Court should grant MPCA injunctive relief. (MPCA Memo. p 42). MPCA has utterly failed to support the claim that "pollution" within the meaning of Minn. Stat. § 115.01, subd. 15 exists, as was its burden in moving for summary judgment. *See Simprich v. Stratford Homes, Inc.*, 453 N.W.2d 557, 560 (Minn. Ct. App. 1990) ("The initial burden of proof is on the moving party to show no genuine issues of material fact exist."). U.S. Steel emphatically disputes that such conditions exist at or around the Tailings Basin. Accordingly, summary judgment concerning alleged pollution must be denied.

VI. MPCA'S CLAIMS WITH RESPECT TO THE DRY CONTROLS ARE UNSUPPORTED.

MPCA asserts that the unambiguous language of the Agreement required U.S. Steel to construct dry controls on four taconite production lines at the Minntac facility. MPCA Memo. p.

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

45. Because MPCA's understanding contradicts the plain language of the Agreement, MPCA also argues in the alternative that parol evidence supports its contention. *Id.* at pp. 46-47. The plain language of the Agreement evidences that, at most, U.S. Steel agreed to submit a permit amendment application for installation of dry controls *on a single production line*. U.S. Steel fully complied with this obligation, precluding any claim under the Agreement. Moreover, MPCA's reliance upon parol evidence on summary judgment is procedurally improper. The proper interpretation of the available parol evidence with respect to the dry controls is disputed, and the Court may only consider this conflicting evidence at trial. Additionally, MPCA has waived the right to enforce the dry controls provisions of the Agreement by repeatedly inducing U.S. Steel to believe MPCA would not be enforcing the dry controls provisions. For all these reasons, the Court should deny summary judgment with respect to the dry controls.

A. Under the Plain Language of the Agreement, U.S. Steel Did Not Agree to Install Dry Controls on Four Lines at the Minntac Facility.

When a written contract is clear and unambiguous, Minnesota courts will not attempt to interpret it or change its meaning by consulting extrinsic evidence. *Cunningham Implement Co. v. Deere and Co.*, No. C7-95-1148, 1995 WL 697555, at *3 (Minn. Ct. App. Nov. 28, 1995) (citing *City of Virginia v. Northland Office Props.*, 465 N.W.2d 424, 427 (Minn. Ct. App. 1991)); *Blattner v. Forster*, 322 N.W.2d 319, 320-321 (Minn. 1982) (rejecting party's argument regarding intention of parties under agreement where that contention was contrary to the unambiguous language of the contract).

In its memorandum, MPCA conspicuously fails to quote the language of the Agreement. *See* MPCA Memo. pp. 46-47. The reason is self-evident: the plain language of the Agreement defeats MPCA's claim that U.S. Steel was required to install dry controls on four taconite

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

production lines. Part 7 of the Agreement contains the requirements U.S. Steel agreed to undertake. Part 7(a) reads:

> Within 60 days of the effective date of this Agreement, the Regulated Party will submit to MPCA a permit amendment application to permit the installation of the "Dry Controls Project" ***on Taconite Production Line 6*** at the Regulated Party's Minntac facility.

Stefonowicz Aff. 5/5/17 Ex. A p. 9 Part 7(a) (emphasis added). If U.S. Steel sought to withdraw its application for dry controls and MPCA refused to permit withdrawal, U.S. Steel was granted the right to contest a denial through use of dispute resolution procedures. *Id.* Part 7(b). MPCA and other regulatory agencies had to grant necessary permits before construction became necessary. *Id.* Part 7(c). After the dry controls were constructed on line 6, U.S. Steel would complete a performance evaluation of the dry controls project. *Id.* pp. 9-10 Part 7(e). U.S. Steel would collect at least *six months*' worth of data on various parameters. *Id.* p. 10 Part 7(e).

Part 7 of the Agreement is instructive that, other than submitting an application for permit amendment for dry controls on line 6, U.S. Steel did not commit to install dry controls on any other line at the Minntac facility. *See generally* Stefonowicz Aff. 5/5/17 Ex. A Part 7. It is undisputed that U.S. Steel submitted an application to modify its air permit to install dry controls on line 6. MPCA Memo. p. 14. For the reasons articulated in Section VI(C) below, MPCA waived the right to enforce any other provision of the Agreement with respect to dry controls.

B. <u>If the Court Concludes the Agreement is Ambiguous, Summary Judgment Must be Denied</u>.

MPCA invites the Court to analyze parol evidence to discern the parties' intent under the Agreement. MPCA Memo. pp. 46-47. This would be an inappropriate basis upon which to grant summary judgment. Where, as here, there is a dispute concerning the significance and meaning of parol evidence, summary judgment is improper. Among other things, U.S. Steel vigorously

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

disputes that the Agreement mandates U.S. Steel to install the dry controls on four production lines. Bartovich Decl. ¶2. Given the differences in the parties' conclusions with respect to the parol evidence, MPCA's motion for summary judgment must be denied.

Summary judgment is not appropriate where parol evidence must be considered to determine the parties' intentions under a contract. *Glaser v. Minnesota Fed. Sav. & Loan Ass'n*, 289 N.W.2d 763, 765 (Minn. Ct. App. 1986); *cf. St. Paul Fire & Marine Ins. Co. v. Lenzmeier*, 309 Minn. 134, 138 (1976) ("If there were disputed parol evidence concerning the intent of the parties when drafting these provisions, submission to the jury would be appropriate."). The Court must discard MPCA's invitation to decide factual issues on summary judgment and deny MPCA's summary judgment motion on its counterclaims.

C. Waiver Bars MPCA's Enforcement of the Dry Controls Provisions of the Agreement.

The undisputed facts evidence that MPCA did not require strict compliance with the Agreement but instead repeatedly waived its provisions with respect to dry controls. MPCA's newfound zeal to enforce the Agreement appears to be motivated by a desire to retaliate against U.S. Steel for having initiated the mandamus action against MPCA. However, the undisputed facts demonstrate that MPCA failed to enforce the Agreement for years and repeatedly led U.S. Steel to believe it would not demand strict compliance. U.S. Steel relied upon MPCA's representations and spent significant time studying and analyzing alternative technologies. Accordingly, MPCA has waived its right to enforce the Agreement with respect to dry controls.

It is black letter law that repeated failure to enforce a contractual provision amounts to a waiver of that contract provision. *Cf. Quinn v. Olson*, 34 Minn. 422, 425 (1886) ("An extension of the time prescribed of payment would necessarily, as a legal result, constitute a waiver of the right to enforce the contract according to its terms."); *Williams v. Allstate Ins. Co.*, No. C9-89-

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

2065, 1990 WL 48578, at *1 (Minn. Ct. App. April 24, 1990) ("where an insurance company varies the term of a contract by accepting premiums after they become due, long enough to amount to a custom, it waives strict enforcement of the contract."). In addition, an estoppel arises when:

> . . . [O]ne, by his conduct and representations, induces another to believe certain facts with reference to a transaction between them to exist, and such other person, having the right to do so, acts and relies thereon, and in the belief that such representations are true, and is thereby deceived, and to such an extent that to permit a denial of the truth of the facts so represented to exist would prejudice him.

Western Land Ass'n v. Banks, 80 Minn. 317, 320 (1900), *overruled on other grounds by Schwinn v. Griffith*, 303 N.W.2d 258, 262 (1981). In accordance with the Agreement, U.S. Steel submitted an application for dry controls for line 6 on August 8, 2011. Bartovich Decl. ¶3. MPCA returned the application and requested additional information. MPCA proposed that a revised dry controls application could wait until *after* issues with the dry controls were resolved. Declaration of Michael Schmidt dated May 4, 2017 Ex. 2 (proposing that U.S. Steel not resubmit an application for dry controls until "most, if not all, permitting issues have been resolved."). Thereafter, U.S. Steel continued to work with MPCA to analyze issues relating to dry controls. Discussions continued into 2014. Bartovich Decl. ¶3.

Although U.S. Steel worked diligently to resolve issues related to dry controls, there still remained significant obstacles to installation, including emission calculations, associated permit conditions, design criteria, and fluoride discussions. Bartovich Decl. ¶5. Moreover, there were various material changes in circumstances between 2011 and 2014 that counseled against use of the dry controls, such as MPCA's pre-public notice draft NPDES/SDS permit for Minntac issued in December 2014. *Id.* The Agreement had originally been written because a reissued permit did

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

not appear to be feasible in the near future. *Id.* However, the new permit ostensibly would contain a compliance schedule related to water quality standards that would take the place of the SOC requirements. *See id.*

After U.S. Steel had conducted extensive analysis of Dry Controls and other water related projects in accordance with the Agreement, it determined that Dry Controls could not achieve compliance of the 250 mg/L groundwater standard at the property boundary near MW12. Bartovich Decl. ¶6. However, U.S. Steel continued to investigate potential sulfate reduction technologies and discovered the PRB technology had the potential to achieve and exceed the groundwater sulfate compliance offered by Dry Controls. *Id.* U.S. Steel proposed to MPCA that installation of PRB be used as an alternative to Dry Controls to achieve compliance at MW12 in November 2014. *Id.* at ¶7.

MPCA did not insist on strict compliance with installation of dry controls on line 6. *See* Foss Decl. ¶16. It is undisputed that, after MPCA was told U.S. Steel would not be installing dry controls on line 6, MPCA indicated that alternate proposals would be considered so long as they would achieve the same environmental benefits in the same time period. *Id.* U.S. Steel communicated to MPCA that it believed alternative technologies such as PRB would allow groundwater regulations to be met on or before their respective deadlines. Bartovich Decl. ¶8.

Prior to MPCA filing its Counterclaims, U.S. Steel understood that MPCA was willing to work with U.S. Steel to employ alternate technologies that were equally effective in lieu of dry controls. *Id.* at ¶9. U.S. Steel developed this understanding based upon numerous communications from MPCA, both written and oral. *Id.* Because of MPCA's inducements, U.S. Steel invested significance resources and staff time in an effort to study alternatives such as PRB that would prove more effective than dry controls. *Id.* Accordingly, the Court should find that

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

MPCA has waived and/or is estopped from enforcing the dry controls provisions of the Agreement. *Cf. Quinn*, 34 Minn. at 425; *Williams*, 1990 WL 48578, at *1.

VII. MPCA IS ENTITLED TO NO RELIEF WITH RESPECT TO THE SCRS.

MPCA seeks an order requiring U.S. Steel to begin operating a Dark River watershed SCRS that is "acceptable" to MPCA within 2 years. *See* MPCA Proposed Order. MPCA's request is premised upon its erroneous conclusion that U.S. Steel's obligation to construct the SCRS arose under the contract. However, because not all conditions precedent to construction of the SCRS have ever been satisfied, U.S. Steel did not have the obligation to construct the SCRS. In addition, there is no basis for MPCA to request an order compelling U.S. Steel to construct the SCRS when U.S. Steel has attempted to obtain necessary permits but various governmental agencies—including MPCA—have failed to act. Accordingly, MPCA is entitled to no relief with respect to the SCRS.

A. The Court Should Deny MPCA Summary Judgment with Respect to the SCRS Because Conditions Precedent to U.S. Steel's Duty to Construct the SCRS Have Never Been Fulfilled.

The Agreement required U.S. Steel to retain a consultant to perform an evaluation of the feasibility of collecting surface seepage from the west side of the Minntac tailings basin for return to the recirculating process water system to eliminate the discharge of surface seepage to the Dark River Watershed. Stefonowicz Aff. 5/5/17 Ex. A p. 9 Part 7(tt). Additionally, U.S. Steel was required to contact federal, state and local wetland authorities within sixty days to introduce them to the SCRS project. *Id.* at Part 7(uu). U.S. Steel was required to submit a feasibility report to MPCA within six months. *Id.* at Part 7(vv). If determined feasible, U.S. Steel would submit an application for modification or reissuance of the NPDES/SDS permit and that would be subject to approval by MPCA. *Id.* at Part 7(ww). Of greatest significance here, the Agreement provided conditions precedent to the construction of the SCRS:

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

> The Regulated Party shall commence construction of the SCRS ***following the latter of either*** MPCA approval of the SCRS Plans and Specifications or the expiration of any appeal period for the permit ***issued by MPCA or other appropriate regulatory agencies*** pursuant to the application(s) submitted to such agencies[.]"

Id. at Part 7(yy). Accordingly, construction was not required until after MPCA and other regulatory agencies granted permits necessary for the construction of the SCRS and any appeal periods for those permits expired. *See id.* The words "following the latter of either" plainly signify a condition precedent to U.S. Steel's performance: unless both conditions were satisfied, U.S. Steel's obligation to construct the SCRS did not arise. *See Matter of Matthieson*, 63 B.R. 56, 60 (Bank. D. Minn. 1986). "When a condition precedent is not satisfied, it relieves a party to the contract of the obligation to perform." *Id.* Although the failure of a condition precedent does not nullify a contract, it does mean that performance cannot be compelled under a contract. *Id.* Here, MPCA may not compel performance under the Agreement because the condition precedent contained in Part 7(yy) has never been satisfied.

U.S. Steel has applied for, but not yet received, various permits necessary for construction of the SCRS. Specifically: (1) U.S. Steel applied for a necessary wetland permit from the Army Corps but not yet received a permit; (2) U.S. Steel submitted an indirect monitoring plan to DNR, MPCA, and the Army Corps on November 30, 2016, but none of those agencies have approved or denied the monitoring plan; (3) U.S. Steel submitted revised design plans on January 20, 2017, however MPCA has never approved the revised plans; and (4) DNR has never provided necessary information in order to complete a permit to mine application.

Under the plain language of Part 7(yy) of the Agreement, U.S. Steel has never had an obligation to commence construction of the SCRS because both MPCA and other regulatory

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

agencies have failed to approve necessary permits. Accordingly, MPCA's motion should be denied insofar as it concerns the SCRS.

B. There is No Basis for an Order Compelling U.S. Steel to Construct the SCRS When Construction Requires U.S. Steel to Obtain Permits From Third Parties.

MPCA's request for relief concerning the SCRS seeks an order compelling U.S. Steel to obtain permits from third parties. Equity does not support this Court's ordering U.S. Steel to obtain permits within a limited period of time when action on those permits wholly depends upon the actions of third parties outside of this lawsuit. "[O]ne of the cardinal rules of a court in the exercise of its discretion in granting or denying specific performance is that it must appear that specific performance will not result in injustice." *In re MJK Clearing, Inc.*, 286 B.R. 109, 125 (Bankr. D. Minn. 2002). An order requiring construction of the SCRS within a definite period of time—irrespective of delays that may be caused by administrative agencies reviewing necessary permits—would be arbitrary and would unjustly put U.S. Steel at the mercy of third parties. Accordingly, the Court should deny MPCA relief with respect to the SCRS.

VIII. MPCA'S COUNTERCLAIMS MUST BE DISMISSED BECAUSE MPCA FAILED TO FOLLOW THE MANDATORY DISPUTE RESOLUTION PROCEDURES IN THE AGREEMENT.

MPCA has failed to comply with the mandatory dispute resolution procedures contained in the Agreement. MPCA's counterclaims in this lawsuit allege violations akin to the violations alleged and described in Part 6 of the 2011 Schedule of Compliance as well as other breaches of the Agreement. The Agreement required MPCA to follow the dispute resolution procedures prior to bringing these claims in court. Accordingly, MPCA's counterclaims are subject to dismissal.

The Agreement provides that the parties "shall" resolve disputes arising "as to any part of the Agreement" pursuant to the dispute resolution procedures contained in Part 11. Stefonowicz Aff. 5/5/17 Ex. A p. 28. Clearly, the use of the word "shall" makes these dispute resolution

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

procedures mandatory for any dispute relating to the Agreement. *Cf. Dukowitz v. Hannon Sec. Svcs.*, 841 N.W.2d 147, 155 (Minn. 2014) ("The use of the word 'shall" . . . 'indicates a duty that is mandatory, not one that is optional or discretionary.'") (quoting *Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 637-638 (Minn. 2012)). Just as importantly, in Part 9 of the Agreement, MPCA agreed "not to exercise any administrative, legal, or equitable remedies available to MPCA to address the violations alleged and described in Part 6[.]" *Id.* at pp. 28-29. The Agreement thus forbids MPCA from bringing a legal action premised upon allegations akin to those described in Part 6 of the Agreement.

MPCA's counterclaims relating to increased sulfur and other pollutants from the Tailings Basin causing alleged violations of WQS restate the same type of violations as were identified in Part 6 of the Agreement. *Compare* Stefonowicz Aff. Ex. A p. 8 *with* Countercl. at ¶¶17, 19-22. MPCA also alleges other violations of the Agreement, including failure to submit an application for the Dry Controls, and failure to install the SCRS system. Councrl. at ¶¶ 46-49. It is evident that MPCA's counterclaims "arise" from the Agreement and are therefore subject to the mandatory dispute resolution procedures of the Agreement. Any interpretation of the Agreement that would permit MPCA's present lawsuit would render Parts 9 and 11 a nullity and should be rejected. *See Independent School Dist. No. 877 v. Loberg Plumbing & Heating Co.*, 266 Minn. 426, 437 (1963) (observing that it is a "cardinal rule of construction that any interpretation which would render a provision [of a contract] meaningless should be avoided on the assumption that the parties intended the language used by them to have some effect.") (citation omitted). Because the MPCA failed to follow the Agreement's obligatory dispute resolution procedure, MPCA's counterclaims should be dismissed.

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

IX. MPCA'S COUNTERCLAIMS MUST BE DISMISSED BECAUSE THIS COURT IS NOT THE APPROPRIATE FORUM.

MPCA asks for the Court to "require U.S. Steel to take actions to reduce the pollutants leading to the standards exceedances [sic] in a manner that is consistent with the MPCA's ***proposed permit***." MPCA Memo. p. 43 n. 29 (emphasis added). MPCA's counterclaims in this action mark a dramatic deviation from ordinary administrative procedure and are plainly premature. MPCA seeks to have this Court order U.S. Steel to comply with standards that are the subject of a pending administrative proceeding and will not be finalized until MPCA actually issues the final permit. MPCA should not be allowed to sidestep the ordinary permitting process by asserting claims in this Court. Accordingly, MPCA's counterclaims should be dismissed.

The MPCA is in the middle of the process of reissuing the NPDES/SDS permit and is proceeding towards its "final determination" under Minn. Rules 7001.0140 whether to reissue the permit. It is at that point that the MPCA determines that the permittee "will, with respect to the facility or activity to be permitted, comply or will undertake a schedule of compliance to achieve compliance with all applicable state and federal pollution control statutes and rules administered by the agency." Minn. Rules 7001.0140 subpart 1. Despite that these administrative proceedings are ongoing, MPCA requests the Court to "fashion an equitable remedy". MPCA Memo. p. 44. Put simply, there is no need for equitable relief from this Court because MPCA's counterclaims could all be resolved in the permitting proceeding. *Stocke v. Berryman*, 632 N.W.2d 242, 256-246 (Minn. Ct. App. 2001) (holding that equitable relief is inappropriate where a legal remedy exists).[11] Thus, MPCA's motion for summary judgment on its counterclaims should be denied.

---

[11] Unlike U.S. Steel, MPCA has significant control over the timing and substance of the permitting proceedings. Accordingly, the pendency of those proceedings gives MPCA an adequate remedy precluding equitable relief from this Court.

Filed in Second Judicial District Court
5/24/2017 4:51:08 PM
Ramsey County, MN

CONCLUSION

For the foregoing reasons, Plaintiff United States Steel Corporation respectfully requests that the Court deny MPCA's motion for summary judgment in its entirety. In addition, U.S. Steel requests that the Court grant summary judgment on Counts I-VI of its Verified Complaint and Petition for Writ of Mandamus. Furthermore, Plaintiff requests that the Court grant permanent injunctive relief as follows: (1) compelling MPCA to forthwith take action on the UAA Petition, Site-Specific Request, and to modify the water quality standards pursuant to the triennial review; and (2) enjoining MPCA from reissuing the NPDES permit until after it has taken action with respect to the UAA Petition, Site-Specific Request, and after it has modified the water quality standards pursuant to the triennial review. Finally, Plaintiff requests that the Court grant Plaintiff's motion for judgment on the pleadings or Plaintiff's motion for summary judgment and dismiss MPCA's counterclaims.

Dated: May 24, 2017

s/ Rob A. Stefonowicz

Rob A. Stefonowicz (0297161)
Peder A. Larson (0172923)
Bryan J. Huntington (0395762)
Larkin Hoffman Daly & Lindgren Ltd.
8300 Norman Center Drive, Suite 1000
Minneapolis, Minnesota 55431-1194
(952) 835-3800
rstefonowicz@larkinhoffman.com
plarson@larkinhoffman.com
bhuntington@larkinhoffman.com

David L. Smiga
United States Steel Corporation
Assistant General Counsel - Environmental
600 Grant Street, Suite 1500
Pittsburgh, Pennsylvania 15219-2800
(412) 433-2851

Attorneys for Plaintiff-Petitioner

4814-1477-8441, v. 1